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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

Guardianship of the Person of Aaron B., a Minor.	
B.B., Petitioner and Respondent, v. R.M., et al., Objectors and Appellants.	A136721 (San Mateo County Super. Ct. No. PRO-115632)

Appellants R.M. and E.D.M., legal guardians of Aaron B., appeal from the probate court's order increasing respondent B.B.'s visitation with Aaron by adding one weekday overnight stay to his existing visitation schedule. They assert the court committed legal error and abused its discretion in granting respondent's visitation request. We disagree and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On December 22, 2006, appellants were appointed permanent guardians of their grandson Aaron, who was 15 months old at the time and had lived with them for virtually his entire life. Their daughter, A.M. is Aaron's mother. She lives in Missouri.

Over time, respondent, who is Aaron's father, has requested increased visitation with Aaron. As of June 2011, his visitation schedule was: (1) every Tuesday and Thursday from 3:30 p.m. to 7:00 p.m., (2) every second and fourth Friday of the month

from 3:30 p.m. to Monday 8:00 a.m., and (3) the fifth weekend of any odd-numbered month having five weekends.

On March 20, 2012, respondent filed a motion to increase his visitation. He requested the Tuesday and Thursday times be extended to encompass overnight visits, with him dropping Aaron off at school the following mornings. He also requested all fifth weekends in both odd-numbered and even-numbered months, as the stipulated order granting appellants the fifth weekends in even-numbered months had been conditioned on A.M. returning to live in the Bay Area.[1]

On April 6, 2012, appellants filed their opposition to the motion to modify respondent's visitation schedule. They claimed the proposed schedule, under which Aaron would never spend two consecutive weeknights in the same home, "would be disastrous for Aaron" because "[c]hanges . . . in routine create major problems for him, and he has been known to act out as a result." Notably, while appellants reported extensively regarding the discomfort that *they* feel in their relationship with respondent, their opposition does not tie any of Aaron's behavioral issues to problems that he has experienced while spending time with his father. For example, they complained that respondent "continues to insult us by making false allegations to the court such as claiming that we are 'not consistent disciplinarians.' " They also note that respondent does not contribute to Aaron's financial support. While they do report that respondent has made detrimental comments to Aaron, such as stating that he loves Aaron more than they do,[2] the main thrust of the opposition was that they "continue to be frustrated by [respondent's] refusal to acknowledge the legal ramifications of *our role* as Aaron's guardians and his continued focus on conflict with us rather than what is in Aaron's best interest."

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[1] Respondent also requested that Aaron call him at regularly scheduled times, that he have the right of first refusal for child care, that appellants be prohibited from scheduling extracurricular activities during his visitation time, that they give him three weeks' notice of any scheduled vacations and that they agree to make-up visitation, and that a forensic psychologist be asked to perform a time-share evaluation. These requests are not at issue in this appeal.

[2] In his reply to appellants' opposition, respondent denied making such statements.

On April 16, 2012, the matter was referred to Family Court Services for mediation and recommendations. Appellants agreed that respondent could have Aaron for all fifth weekends. They also agreed to participate in "communication" counseling, to refrain from enrolling Aaron in activities occurring during respondent's visitation days without his consent, and that the parties would each have the right of first refusal if they were unable to care for Aaron for a period exceeding four hours. The parties were unable to reach agreement on extending respondent's visitation time on Tuesdays and Thursdays to the following mornings, as he had requested.

In a report dated June 25, 2012, the mediator declined to recommend changes to the weekday visitation schedule. She based her recommendation on comments from Aaron's teacher to the effect that the child "struggles when his normal schedule is disrupted." Additionally, Aaron's therapist had reported that "it is difficult for the minor to adjust when there is a fifth weekend," and that Aaron "needs to have a predictable schedule and a clear understanding of who will care for him and meet his needs."

On July 23, 2012, the probate court ruled respondent's visitation with Aaron would be expanded to include overnight visits on Tuesday only. This appeal followed.

DISCUSSION

I. The Challenged Order Is Appealable

At the outset, respondent suggests that this court lacks jurisdiction to consider this appeal.[3] He asserts visitation orders in a probate case are not appealable orders. We conclude that the order is reviewable on appeal.

It is settled that the right to appeal is strictly statutory, and a judgment or order is not appealable unless made so by statute. (*H.D. Arnaiz, Ltd. v. County of San Joaquin* (2002) 96 Cal.App.4th 1357, 1365.) In civil matters, Code of Civil Procedure section 904.1 is the main statutory authorization for appeals. (*H.D. Arnaiz, Ltd.*, at pp. 1365–1366.) Code of Civil Procedure section 904.1, subdivision (a) provides in relevant part that an appeal may be taken from: a final judgment (subd. (a)(1)); an order

[3] Respondent filed a motion to dismiss the appeal, which we have denied.

made after an appealable judgment (subd. (a)(2)); or "an order made appealable by the provisions of the Probate Code or the Family Code" (subd. (a)(10)). While courts have stated that "Appeals in guardianship proceedings lie only from orders specifically enumerated by the Probate Code,"[4] (*Guardianship of Kaylee J.* (1997) 55 Cal.App.4th 1425, 1429), we note the Probate Code specifies that the appointment of a guardian is governed by the Family Code chapters beginning with sections 3020 and 3040. (Prob. Code, § 1514, subd. (b).)

The Family Code contains no express provision governing appeals of child custody orders, except for those to enforce an order for the return of a child under the Hague Convention (Fam. Code, § 3454). The right to appeal a child custody determination is generally limited to final judgments and orders made after final judgments. It is established that a trial court's ruling on a parent's request for modification of judgment as to custody and visitation is appealable as an order made after judgment. (*Enrique M. v. Angelina V.* (2004) 121 Cal.App.4th 1371, 1377.) Thus, in the context of the Family Code, "[v]isitation orders are appealable orders under Code of Civil Procedure section 904.1, subdivision (a)(10)." (*Chalmers v. Hirschkop* (2013)

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[4] Probate Code section 1301 provides: "With respect to guardianships, conservatorships, and other protective proceedings, the grant or refusal to grant the following orders is appealable:

"(a) Granting or revoking of letters of guardianship or conservatorship, except letters of temporary guardianship or temporary conservatorship.

"(b) Granting permission to the guardian or conservator to fix the residence of the ward or conservatee at a place not within this state.

"(c) Directing, authorizing, approving, or modifying payments, whether for support, maintenance, or education of the ward or conservatee or for a person legally entitled to support, maintenance, or education from the ward or conservatee.

"(d) Granting or denying a petition under Section 2423 or under Article 10 (commencing with Section 2580) of Chapter 6 of Part 4 of Division 4.

"(e) Affecting the legal capacity of the conservatee pursuant to Chapter 4 (commencing with Section 1870) of Part 3 of Division 4.

"(f) Adjudicating the merits of a claim under Article 5 (commencing with Section 2500) of Chapter 6 of Part 4 of Division 4.

"(g) Granting or denying a petition under Chapter 3 (commencing with Section 3100) of Part 6 of Division 4."

213 Cal.App.4th 289, 304.) We see no reason why this principle should not apply to the instant case.

Respondent also claims the challenged ruling arises from an interlocutory order. However, the instant order does not appear to be preliminary to a later hearing or judgment. No trial or further proceedings are referred to in the order. Instead, the order affirms the status quo as to the guardianship and merely modifies the existing visitation arrangements. We therefore find the order to be appealable as an order after a judgment.[5]

II. The Probate Court Did Not Abuse Its Discretion

Family Code section 3020, subdivision (a) declares that "the health, safety, and welfare of children shall be the court's primary concern in determining the best interest of children when making any orders regarding the physical or legal custody or visitation of children." The standard of appellate review of custody and visitation orders is the deferential abuse of discretion test. (*Gudelj v. Gudelj* (1953) 41 Cal.2d 202, 208.) The precise measure is whether the trial court could have reasonably concluded that the order in question advanced the "best interest" of the child. We are required to uphold the ruling if it is correct on any basis, regardless of whether such basis was actually invoked. (*Montenegro v. Diaz* (2001) 26 Cal.4th 249, 255.)

The probate court has the continuing power to grant visitation rights in a probate guardianship proceeding: " '[T]he guardianship itself is not concluded . . . until the guardian has been discharged. Jurisdiction of the court in this respect is a continuing one, and as an arm of the court the guardian in his duties acts *under the authority of the supervision of the court which appointed him*. . . . [¶] . . . If circumstances subsequent to the original order make it desirable and conducive to the comfort and well-being of the child that a modification thereof be made, the court, to alleviate or correct the situation, has jurisdiction to order that regulations be imposed upon the guardian, *such as directing that a relative or other person should have access to the child whose custody is decreed*

[5] We also observe that an appellate court has the discretion to treat an improper appeal from a nonappealable order as a petition for an extraordinary writ. (*Olson v. Cory* (1983) 35 Cal.3d 390, 400–401.)

in the guardian. [Citations.]' [Citation.]" (*Guardianship of Martha M.* (1988) 204 Cal.App.3d 909, 913–914, italics added.)

Before addressing the merits, we note appellants do make various arguments that are not cognizable in this appeal.[6] For example, they claim the probate court's visitation order "was based on an error as to the law governing probate guardianships." Their objection is founded on statements made by the court during the hearing, allegedly to the effect that respondent's legal rights are superior to theirs even though they are Aaron's permanent legal guardians. They also claim the court acted under the erroneous assumption that it has the authority to order reunification in a guardianship proceeding. The order appealed from here, however, merely extends respondent's existing visitation with his son by a single additional overnight visit. It does not alter the legal status between the parties in any other way. Thus, the court's statements during the hearing, even if they have the meaning that appellants ascribe to them, are not relevant to our decision here. Our task is merely to decide if the court abused its discretion in making the determination that it was in Aaron's best interests to have increased visitation with his father.

Here, no abuse of discretion appears. The probate court, not unreasonably, concluded that it was in the best interest of Aaron that his father be granted an additional overnight visit during the week. Contrary to appellants' assertion on appeal, the court did not find "that the father's wishes carried the day." Respondent requested Tuesday and Thursday overnight visits, but the request was granted only as to Tuesday. The court clearly considered and understood the recommendations of the Family Court Services mediator, including statements made by Aaron's teacher and therapist concerning Aaron's need for predictability. At the same time, the mediator's report indicated that the child has a very positive relationship with his father. Aaron reportedly had conveyed "the impression that he would like more time with [respondent] because he sleeps at

[6] Respondents' request that the matter be remanded to another judicial officer pursuant to Code of Civil Procedure section 170.6, subdivision (a)(2), was not raised below and is not properly before this court.

[appellants'] home during the week." Additionally, his teacher "saw no change in [his] behavior correlating with the father's visits." It was evident that Aaron "loves the father and feels comfortable around him." In light of this evidence, we are unable to conclude that the probate court committed an abuse of discretion in increasing respondent's visitation with Aaron to include one weekday overnight stay.

DISPOSITION

The order is affirmed.

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Dondero, Acting P. J.

We concur:

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Banke, J.

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Sepulveda, J.*

* Retired Associate Justice of the Court of Appeal, First Appellate District, Division Four, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.